COMMISSIONERS PROCEEDINGS
JANUARY 20, 2004
CLARK COUNTY, WASHINGTON

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Stanton, Pridemore, and Morris, Chair, present.

PLEDGE OF ALLEGIANCE

The Commissioners conducted the Flag Salute.

BID AWARD 2354

Reconvened a public hearing for Bid Award 2354 – Annual Janitorial Supplies (continued from January 13, 2004). Mike Westerman, General Services, read a memo from General Services requesting that Bid 2354 be awarded on a total basis, including accepted alternate item(s), to the lowest responsive bidder meeting all specifications. There being no public comment, **MOVED** by Stanton to award Bid 2354 to Walter E. Nelson Company of Portland, Oregon, in the total bid amount of $68,216.71 including Washington State Sales tax and grant authority to the County Administrator to sign all bid related contracts. Commissioners Morris, Stanton, and Pridemore voted aye. Motion carried. (See Tape 70)

PUBLIC COMMENT

There was no public comment.

CONSENT AGENDA

There being no public comment, **MOVED** by Pridemore to approve items 1 through 8. Commissioners Morris, Stanton, and Pridemore voted aye. Motion carried. (See Tape 70)

PUBLIC MEETING: LIVINGSTON MOUNTAIN QUARRY

Held a public meeting to consider an appeal of the Clark County Hearing Examiner's decision in the matter of an appeal of a Type II staff decision approving a site plan and a SEPA Mitigated Determination of Non-significance to mine within a 40-acre site in the FR-80 zone with a Surface Mining Overlay.

The Board of Commissioners received no public comment, oral or written, at this meeting.

Meeting continued from January 6, 7, and 13.

The board certified reading the record.

Pridemore stated that he liked the way staff had identified the issues, as well as their responses. He said that when it comes to SEPA issues, he always questions what is legitimately before the board and what isn't.

Rich Lowry, Prosecuting Attorney's Office, stated that the board does not have jurisdiction over what are called procedural SEPA issues, such as the adequacy of a DNS/EIS.

Morris said she didn't think they had jurisdiction over substantive.

Lowry said they do have jurisdiction over substantive. He explained that if conditions are imposed based on SEPA they do have the ability to review those. He said that in this case there is a procedural SEPA challenge asking the board to overturn the refusal of the examiner to withdraw or overturn the DNS. Lowry stated that in the past he has advised the board that the examiner didn't have jurisdiction over that because SEPA rules state that the only appealable SEPA decisions are a DS, DNS, or the adequacy of an EIS. However, the examiner went ahead and reached the merits of it and concluded that he didn't find any new information suggesting that there were significant impacts.

Pridemore said that in going through each of the issues individually, he was somewhat at a loss as to what exactly was being appealed. He said he found the appeal to be without merit.

Stanton stated that one of the things they look for in an appeal letter is specificity, e.g. where did the hearings examiner error? She said that according to code, that's expected in the appeal. She said an appeal letter is more of an opinion that's in disagreement with what the hearings examiner concluded.

Pridemore added that there was considerable information in the record that supports the decision of the hearings examiner.

Morris agreed, stating that she could find no error in the hearings examiner decision.

MOVED by Pridemore to deny the Livingston Mountain Quarry appeal and uphold the Hearings Examiner. Commissioners Morris, Stanton, and Pridemore voted aye. Motion carried. (See Tape 70)

PUBLIC MEETING: CUP 2002-00001 WASHOUGAL MOTOCROSS

Held a public meeting to consider appeals of the Clark County Hearing Examiner's decision regarding an application for a conditional use permit for the Washougal Motocross and related uses north of NE Borin Road and west of NE 412th Avenue.

The Board of Commissioners received no public comment, oral or written, at this meeting.

Meeting continued from January 6, 7, and 13.

Morris explained that this appeal has been before the Board in the past and the reason it was in front of them again was because of a remand to the hearings examiner to clarify the record and to show his work. She asked Mr. Lowry to walk them through the articulated reasons for the remand and what they had asked the hearings examiner to do.

The Board certified reading the record.

Rich Lowry, Prosecuting Attorney's Office, stated that the board remanded the matter to the hearings examiner by resolution 2002-10-02, and that there were four specific remand issues. First, there was applicability of the state noise exemption to racing events. He said the examiner had assumed that the noise exemption applied, whereas the state noise exemption requires, for it to be applicable, that the racing facility exist in 1975 and also have some requirements in terms of either the racing event having been permitted or undertaken under the sanctions of an appropriate sanctioning body. Lowry said the second issue is in position of appropriate noise mitigation measures. He said the examiner had struggled in his original decision because there was not much information about noise during the original hearing. He said the board remanded for the purpose of developing an informational base for the examiner to impose appropriate noise mitigation conditions. The third issue dealt with the issue of intensity. In his original decision, the examiner limited the number of events to 40 that he concluded had historically occurred. The board had concluded that that was an inappropriate way to apply the CU significantly detrimental standard; that the examiner should decide that on the merits, not on the history. Lowry said the final remand issue was to approve a plan through a public process. He further explained. Lowry specified that the board was sitting in a special capacity and was not re-hearing the case. He said they do have two requests to put new evidence in – one from the applicant and one from the opponent, who is represented by Keith Hirokawa. Lowry advised that the board should not allow any additional evidence into the record because of limitations in state law. He explained three standards of review that would generally apply to the issues before the board. Lowry said there were additional claims from the appellant that some of the conditions were unduly, onerous, or impractical. He said he thought the examiner, in most cases, made findings in which he had concluded that those conditions were practical. So, the issue is whether there was evidence in the record to support those findings. Lowry said there were many miscellaneous issues such as the setback from Coyote Creek and whether it should have been instead a uniform 400 feet, and the issue of whether or not the examiner in requiring the relocation trail plan imposed standards to guide putting that together. Also, there have been allegations that the decision is too vague.

Morris referenced one item in the staff recommendation, which was that the appeals from the appellants be dismissed as non-meritorious. She was willing to dismiss the appeals from Mr. Hirokawa and Mr. Kepcha for lack of meeting the qualifications.

Lowry stated that in terms of the issue of what the state noise exemption means, it is purely a question of law and, therefore, failure to have extensive cites to the record was probably not fatal. He said the state noise exemption exempts sounds originating from motor vehicle racing events at existing authorized facilities. He said the argument that was raised by both Mr. Hirokawa and Mr. Anderson was that the exemption only deals with the racing that occurred prior to 1975. The off-track usage was never a sanctioned event prior to 1975. Lowry said he thought that necessitated whether the board decide whether the examiner was correct in his conclusion that the exemption applied to the entire property.

Morris didn't disagree with Mr. Lowry. However, her point was that for someone to bring an appeal before the Board stating that the hearings examiner's ultimate approval is arbitrary and capricious and clearly contrary to law, without explaining what law and what makes it arbitrary and capricious, is not sufficient for an appeal. She said she thought they would need to have a discussion about the issues that Lowry had raised before they could even deal with the applicant's appeal.

Lowry agreed with Commissioner Morris in that the starting place was the state noise exemption. He said depending on how they decided it, grand prix races are either allowed or not allowed. In addition to the PA system, the grand prix races are of the most concern to the neighbors.

Morris said that it depended on whether or not they agree with the hearings examiner's finding and believe that he proved his work in saying that the facility and activities therein predated 1975. She said she thought there was evidence in the record to support that finding.

Lowry said he didn't think the opponents who appealed were in disagreement with that. They contend that the state noise exemption limits the activities that are exempt to those that originally occurred. The examiner found that once the facility is exempt then the racing events are exempt.

Morris said she agreed with that decision and there was a lot of evidence in the record. She added that at one point there was a letter that referred to 500 acres; that they used to run trails all the way through the 500 acres.

Stanton noted that the letter was from 1983 and was probably the best evidence that the whole thing had been used.

Pridemore said the question to him was whether the law applies to the facility or to specific events and in his reading of the law it does apply to the facility. He said the remand issue was about the four points that were raised, which is what he focused on.

Morris said she agreed with the hearings examiner that it is a pre-existing facility that is exempt from the state noise law. Under the exemption and state law, all of the activities are exempt from the state noise law because they occurred on the facility. That takes care of the state law part of it, but doesn't get to the issue of noise under the conditional use permit.

Pridemore said that as far as the noise, he struggled with the term "existing approved." There was some evidence about sanctioning from a professional body, but never any public sanctioning. How do you consider it approved? He referred to mitigation issues.

Lowry said that gets you to the remand issue, which gets you to the second remand issue – a requirement that noise studies be done and then application of the CU standard and mitigation.

Pridemore said there was a lot of discussion about what was required in terms of reports. He said he thought there was a lot more evidence in the record this time versus the last time it came before the board. He said he thought the hearings examiner probably did go a bit further in requiring a 10 decibel reduction based on something the applicant had said, but that it might not be achievable; that it might be inappropriate to put in a conditional use permit and that 5 decibels would probably be more appropriate and something the applicant would accept.

Stanton said if she were using her judgment, she probably would make the measurement at the property line.

Lowry said that under state law if this was a regulated activity, then noise would be measured at the property line. The examiner was trying to structure his own requirements because this is exempt from the state noise regulation. He probably concluded that there are properties that don't have houses on them and properties that have houses that are set a ways back, so it made more sense to apply CU standard to measure it at the dwelling.

Pridemore said he came to the conclusion that a court would overturn a requirement if they considered this exempt. He said if the applicant was willing to put in a limitation they would be better off.

Morris said she needed clarity on what the applicant actually said he would do. The hearings examiner said he would go to 10; however, the appeal letter states that they never said that. She thought the tough part would be deciding what the ambient noise level was. She agreed with Commissioner Pridemore in that if the applicant had made an offer on that, she would take it.

Pridemore said he thought he remembered seeing something that offered 10 decibels.

Lowry said that according to the applicant's appeal letter, it was done verbally at the hearing.

Morris interjected that it was 5 decibels, not 10…

Lowry clarified that originally it was 10, but they backed off to 5.

Pridemore said 5 decibels was fine.

Morris asked if they wanted to tackle the issue of ambient noise. She said it was simply a judgment call on the hearing examiner's part, and if she remembered correctly he didn't think it included the grand prix.

Lowry said the examiner constructed his standard premised upon his factual conclusion that both the relative increase over ambient and the absolute level of the noise was significantly detrimental. Lowry said he thought it was an important underpinning of that factual finding that ambient noise level didn't include noise from the historic events.

Morris said you would have to go back a long way to get to that ambient noise level.

Stanton said she took that as a basis for the mitigation; that the hearings examiner proposed to try to get to the point that the noise was no longer significantly detrimental.

There was further discussion regarding ambient noise level.

Lowry said the hearings examiner had first found that the SEPA aspirational standard was not a regulation. In fact, it wasn't directly relevant to his hearing. What it says is that they can find that a 5-decibel increase is significant for purposes of SEPA, which means that they can use that as a basis for requiring environmental analysis. But, he said it was relevant in trying to get a grasp on whether or not they were dealing with a significant noise impact. He concluded that they were. Lowry further explained.

Morris asked what the hearings examiner had said was included in ambient. She said her recollection was that he had decided that ambient was the noise without the races.

Stanton asked if any of the appeals included an appeal about the way the hearings examiner got to ambient.

Pridemore indicated that James Sellers had.

Discussion continued.

Morris said the question is – 5 decibels at the property line from what? The noise standard in state law?

Lowry said yes, for the PA system.

Pridemore said what he was talking about was the PA system; that they had offered to reduce that by 5.

Lowry stated that the applicant's primary argument was that they presented evidence of what they could do and then the examiner requirement more without having an evidentiary basis as claimed for that.

Pridemore said that was on the PA system issue, which he agreed with. He said the hearings examiner was asking for more than perhaps was possible, and just the issues of the ambient noise, etc., which he thought Mr. Sellers was getting to as well…

Lowry said he thought the hearings examiner struggled with the ambient noise levels. He referenced page 23 and the chart, which shows a number of places that the state noise regulations would be violated, assuming their applicability. He said that then presents the issue of whether or not the examiner was correct in concluding that the state noise regulations measured at the house, not the property line, are an appropriate way to get to what constitutes significant detrimental effect.

Pridemore said the examiner's whole argument on that issue struck him as pretty sound in terms of imposing conditions under a conditional use permit.

Morris asked what the allowable noise levels are for racing activities absent the PA, including grand prix. Is the decibel level set for everything together?

Lowry responded that if the exemption applies and they assume that it's operating as a nonconforming use, then there would be no decibel limitation.

Morris again asked what the tolerable level would be when a PA system isn't operating. She said there is a lot of argument over grand prix, and they have already decided that it is exempt from the state noise standard. If they are going to impose noise mitigation requirements on noise from the grand prix, then what is the level they are to achieve?

Stanton asked Lowry if it was correct that they have an aspirational goal in the conditional use permit. Was the hearings examiner trying to go through all of the different alternatives based on the testimony from the neighbors, as well as others who were impacted, to get below the threshold that could be determined as significantly detrimental?

Lowry replied that for noise other than the nationals, the examiner settled on a standard of 57 decibels at the residence.

Pridemore asked if the applicant was saying that they couldn't meet any of the noise requirements or just the PA.

Lowry said the applicant was saying that they couldn't meet the PA requirements as conditioned by the examiner. They might be able to meet the 57 for the main track, but couldn't for grand prix races.

Morris said that was her point. She said she didn't find where 57 decibels was spelled out. If it isn't spelled out, then this matter is just going to come back to the board again.

Pridemore agreed that it needed to be resolved.

Lowry referred to page 38 of the decision, Condition C, which requires that races, practice races, and all other events on the site shall not exceed the maximum permissible environmental noise levels at homes. That maximum is 57 during the day.

Morris asked if they wanted to proceed through the Sellers appeal.

Pridemore said the Sellers appeal was essentially saying that you can't restrict anything under conditional use, which Pridemore didn't agree with. He said the part he didn't get out of it was that it would prevent them from actually continuing to do what they are doing. He said there needs to be some sort of standards applied. He said he felt that the examiner had done a good job of creating a rational argument, but hadn't come to the point that the hearings examiner was precluding operation of the site as it is currently.

Lowry said that was part of the difficulty of the record as it now exists. The applicant claims surprise at this standard and, therefore, didn't submit evidence that this standard couldn't be met, particularly for grand prix races. However, Lowry said he didn't know that the record itself supported that.

Morris noted that there was one appeal item on the 400 ft. and it was interesting to see that the hearings examiner was using the habitat ordinance as some sort of standard for mitigation of noise altogether. Secondly, she said she didn't know about the feasibility of mufflers. She thought the monitoring was a good idea.

Pridemore said he's trying to put parameters in the conditional use permit in order to avoid extreme kinds of accedence's that aren't covered. He said they are attempting to get them in compliance with a conditional use permit and there needs to be those kinds of standards.

Stanton stated that she was able to follow the hearings examiner's line of reasoning and didn't think he had erred. Beyond that, the only error she found in the record was a typo in the conditions.

Pridemore said that one standard that needs to be in place is that they are allowed to operate as they historically have. He said his recollection was that they specifically said no 4x4's, but he didn't remember them specifically saying no grand prix races. He said if they are now imposing conditions that preclude grand prix races, then they've gone farther than what his expectations regarding aspirational noise have been.

Stanton asked if there would still be grand prix racing out there as a nonconforming use if there is no conditional use permit.

Lowry said that will be the issue that gets them back to the state noise exemption and whether, in fact, grand prix races are allowed if they didn't occur prior to 1975.

Morris said she wanted them to get as far as they could on the matter today.

Pridemore agreed, but didn't want to leave it with so few restrictions that the applicant could do anything they want to on the site regardless of impacts on neighbors. He said if they are denying through the noise standards that the hearings examiner is proposing – if they are denying the historical use, then he would say that they do need to make a change.

There was further discussion.

Lowry said the applicant suggested that they could probably comply at the main track, but probably not with the grand prix.

Pridemore asked if there was a way to put a different standard on the grand prix that might lead to resolving it today.

Lowry said if the board agreed with the examiner's conclusion that noise above 57 at adjoining residences, other than during the nationals, is significantly detrimental and the applicant can't adjust grand prix races to meet 57, the consequence would simply be that they're not entitled to a CU and they can rely on their nonconforming rights. Lowry then noted that they hadn't yet reached the issue of intensity of use.

Morris brought up the issue of not using the PA before 10:00 a.m. on Sunday. She wondered where the examiner came up with that. Morris moved on to the issue of intensity of use.

Pridemore had a question about the original remand – something in the previous appeal that had established 1994 as the historic use and where the line is being drawn for the conditional use. Yet, the resolution on the remand made it sound like he should base it on today. He asked Commissioners Morris and Stanton what their expectations and recollections were.

Morris said it was clear from the language of the resolution that they intended for the hearings examiner to consider activities that were post 1994, and he did that and came up with a number of 90. She said there was significant evidence in the record that more than 90 events occurred in 2002.

Pridemore said there was the affordability side of it. The issue was that at some point it should have been under conditional use, should have been covered, and there should be an appropriate line drawn.

Lowry said that was part of the reason why the issue became problematic when it first came around because county code limits physical expansion of nonconforming use, but not temporal expansion.

Morris said she was okay with the hearings examiner's decision regarding the 90 days. She referred back to intensity of use and asked if they agreed with the hearings examiner's finding that the 90 days was the appropriate intensity of use.

Pridemore said he's willing to accept the hearings examiner's finding of 90 days as an appropriate number, but he would tell the applicant not to push it. He added that there was substantial argument that could be made that the 90 days was excessively higher than appropriate.

Stanton said she didn't find fault with the hearings examiner.

Morris verified that they were upholding the hearings examiner in regards to both the intensity of use and the hours of operation on Sunday. She said they were back at the noise issue and asked Commissioner Stanton if she was in agreement with Commissioner Pridemore's suggestion regarding opening up for oral argument or more documentation regarding the issue of the money.

Stanton said there was no evidence that it was going to cost very much to try to come into compliance. She agreed with the hearings examiner in how he had gotten to his definition regarding what would be significantly detrimental – it's a threshold, a noise standard, and that's what should be measured. She said she's not as concerned about whether it cost too much, but feels that their responsibility in approving CU is to find what the appropriate standard is and then make sure there is enough mitigation available to achieve that standard.

Pridemore said he agreed. He said he felt the hearings examiner had spent an inordinate about of time to come up with his requirements and suggested that they give them a chance to work.

Morris asked Lowry what issues were remaining.

Lowry referenced the Sellers appeal where there is objection to mufflers, phone log, monitoring, mapping as being unduly onerous.

Stanton said there was the question of responsibility for monitoring and keeping the records that was the issue.

Morris said there was an objection to the mufflers because there are muffler standards that are set by the different racing associations. There was also an objection to the amount and degree of labor involved in checking every vehicle that comes on course to make sure it has the appropriate muffler.

Pridemore said he didn't find it to be unduly onerous and, in fact, these kinds of reviews take place before a race anyway and records are probably being kept for inspections.

Stanton added that it's in place by a sanctioning body.

Lowry stated that Keith Hirokawa's appeal argues that there is insufficient restriction on Sunday racing. That the future studies put the fox in charge of the hen house; the setback line along the creek rather than a fixed number of feet. They've dealt with noise reading at the residence and offered to bring new evidence on property values.

Morris said she thought that Sunday had been adequately dealt with.

Lowry stated that Mr. Anderson and Mr. Hirokawa fault the examiner for relying on future studies of noise.

Morris and Stanton asked – "what else is there?"

Lowry said the Coyote Creek setback argument that it's irrational to rely on a setback that varies from 100-400 feet from adjacent property lines rather then just setting out a…

Morris said the setbacks in the habitat ordinance are never intended to be for noise mitigation.

Pridemore said there was somewhat a desire to dismiss some of the claims.

Lowry said he thought the examiner's rationale was undoubtedly that it was something that was fixed on the ground now and so made a logical boundary in his judgment. He said that in Mr. Anderson's appeal there is also the contention that it should be a boundary for not only the grand prix racing, but any kind of motorcycle activity.

Pridemore and Morris agreed that was fine.

Stanton pointed out one typo on page 38, where it talks about the Nationals Event when the public address system may operate between 7:00 a.m. and 1:00 p.m. Stanton said that it should be 10:00 p.m.

MOVED by Pridemore to uphold the Hearings Examiner in the case of Washougal Motocross, with the exception of the typo as indicated by Commissioner Stanton, and that the public address system will be decreased by 5 decibels, not 10. Commissioners Morris, Stanton, and Pridemore voted aye. Motion carried. (See Tape 71)

There was discussion between the board and Keith Hirokawa, Attorney, regarding materials he had submitted for the Washougal Motocross and Livingston Mountain Quarry appeals. Mr. Hirokawa didn't think the materials for Livingston Mountain had made it to the record or the board for their consideration.

It was determined that Rich Lowry had received the materials for both appeals.

Stanton asked if they could read Hirokawa's letter from January 2 to see if it would change their decision.

Morris apologized for her earlier comments and said she would read the letters for both Livingston and Washougal Motocross. She asked Mr. Barron to advise Commissioner Pridemore of this discussion. She said that it should be clear from the hearing tapes that they didn't read all of the supplemental materials that were provided from Mr. Hirokawa.

Lowry recommended that when the proposed resolutions are forwarded to the board, they include a reminder that the board is going to think about reconsideration upon reviewing the materials that didn't reach them.

Morris asked Mr. Hirokawa if that was acceptable.

Hirokawa responded that it was.

Brad Anderson, Attorney representing the applicant, stated that they had no objection to that.

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2 p.m. Bid Opening

Present at the Bid Opening:

Mike Westerman and Allyson Anderson, General Services; and Louise Richards, Clerk of the Board

BID OPENING 2353

Held a public hearing for Bid Opening 2353 – NE 149th Street, Public Works Rock Storage Facility. Mike Westerman, General Services, opened and read bids. Westerman said it was their intention to award Bid 2353 on January 27, 2003, at 10:00 a.m., in the Commissioners' hearing room of the Clark County Public Service Center, 6th Floor. (See Tape 71)

BOARD OF COUNTY COMMISSIONERS

Betty Sue Morris/s/
Betty Sue Morris, Chair

Judie Stanton, Commissioner

Craig A. Pridemore/s/
Craig A. Pridemore, Commissioner

ATTEST:

Louise Richards/s/
Clerk of the Board

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